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## Criminal Law - Police Need Not Surrender Fingerprints and Photograph After Acquittal

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Tennessee has taken the position that an appellate court, on its own motion can institute an investigation into the defendant's sanity.<sup>21</sup>

It is apparent that in cases involving appellate review of the trial court's denial of a sanity hearing, the trial court's decision will not be disturbed unless the record indicates an abuse of discretion.<sup>22</sup> In the *Burson* case, the Illinois Supreme Court based its reversal on the fact that counsel's suggestion of insanity, counsel's proposed instructions and the motion for a new trial should have raised a doubt in the trial judge's mind as to the sanity of the defendant. That a sanity hearing was not ordered constituted an abuse of discretion.

<sup>21</sup> In *Green v. State*, 88 Tenn. 634, 14 S.W. 489 (1890), there was no plea of present insanity in the trial court but the appellate court was led to believe from the record and unnatural conduct of the prisoner that the prisoner was insane, and the appellate court, on its own motion, as the only course left open to it, made a thorough investigation of the prisoner's mental condition.

<sup>22</sup> In *People v. Wolfe*, 199 N.Y. Misc. 413, 102 N.Y.S. 2d 12 (1950), on a motion for a new trial brought several months after conviction, the court granted a new trial on the basis of clinical observations made in prison. This decision was reversed, 278 App. Div. 967, 105 N.Y.S. 2d 594 (1951), the Supreme Court holding there was nothing in the record to indicate defendant was incapable of making his defense *at the time of trial*.

#### CRIMINAL LAW—POLICE NEED NOT SURRENDER FINGERPRINTS AND PHOTOGRAPH AFTER ACQUITTAL

Six men were arrested on various charges, acquitted, and released. Since these men had never been arrested before, an action was brought against the Police Commissioner of Chicago asking for the return of all fingerprint cards, photographs, and other identification records taken by the police at the time of arrest. The Circuit Court of Cook County ordered the return of the records. In reversing this decision, the Appellate Court of Illinois held that the statute relied upon by the plaintiffs applied only to the Department of Public Safety and did not require the city police to return records. This statute provides:

It is hereby made the duty of the sheriffs of the several counties of this state and of the chief police officers of all cities, villages, and incorporated towns in this State to furnish to the Department, daily, copies of finger prints on standardized eight by eight inch cards, and descriptions, of all persons who are convicted of felonies. . . . All photographs, finger prints or other records of identification so taken shall, upon the acquittal of the person charged with the crime, or upon his being released, without being convicted, be returned to him.<sup>1</sup>

The court further stated that a retention of this data did not constitute such an invasion of privacy that would entitle plaintiffs to relief in absence of statute. *Kolb v. O'Connor*, 13 Ill. App. 2d 81, 142 N.E. 2d 818 (1957).

<sup>1</sup> Ill. Rev. Stat. (1953) c. 38, § 780 (e).

There have been only two other Illinois cases involving the statutory provision quoted above. In these cases the court did not pass upon, nor have before it, the contention raised in the instant case. In a 1953 case, *Maxwell v. O'Connor*,<sup>2</sup> plaintiff filed a petition based on Section 780(e) of the Criminal Code before the Criminal Court of Cook County,<sup>3</sup> requesting the police commissioner to return data. When the court sustained the petition, the commissioner appealed to the Illinois Supreme Court attacking the constitutionality of the statute and the jurisdiction of the criminal court. The Supreme court upheld the statute and transferred the jurisdiction question to the Appellate court. This court held, without passing upon the applicability of the statute to a city official, a question that had not been raised, that the right involved is a right of privacy, a civil right, and that therefore the criminal court does not have jurisdiction. In the second case involving the statute, the plaintiff brought an action before he was acquitted and relief was denied.<sup>4</sup>

The issue of compelling city police to return identification data after acquittal has arisen in only a few jurisdictions.<sup>5</sup> A review of the history of these cases may show what influenced the decision in the instant case.

Two 1905 Louisiana cases,<sup>6</sup> decided without aid of statute, involved the exhibiting of photographs of acquitted men in a public place, popularly known as the "rogues' gallery." In both instances the plaintiffs were granted relief, the court reasoning that there can be no public good served by exhibiting a picture of an honest man. Supporting these decisions, a Maryland court indicated judicial reluctance to allow pictures of innocent persons to be exhibited in rogues' galleries.<sup>7</sup>

However, in 1917, a Michigan court, in *Miller v. Gillespie*,<sup>8</sup> refused to compel police to return records (no photographs were involved) of a person arrested by mistake. The court held that such records were true and did not expose plaintiff to ridicule nor was it an invasion of his right of privacy.

The history of the problem in New York shows an interesting development. The case of *Molineux v. Collins* held:

<sup>2</sup> 415 Ill. 147, 112 N.E. 2d 469 (1953).

<sup>3</sup> Statute cited note 1 supra.

<sup>4</sup> *Poyer v. Boustead*, 3 Ill.App. 2d 562, 122 N.E. 2d 838 (1954).

<sup>5</sup> The issue does not arise in the federal courts. This is evidenced by a statement in *U.S. v. Kelly*, 55 F.2d 67, 70 (C.A.2d, 1932) ". . . U.S. attorneys and marshals are instructed by the Attorney General not to make public photographs . . . or fingerprints prior to trial . . . and are required to destroy . . . all such records after acquittal. . . ."

<sup>6</sup> *Schulman v. Whitaker*, 115 La. 628, 39 So. 737 (1905); *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905).

<sup>7</sup> *Downs v. Swann*, 111 Md. 53, 73 Atl. 653 (1909).

<sup>8</sup> 196 Mich. 423, 163 N.W. 22 (1917)

The statute directed that records be taken . . . the statute has not authorized him to destroy . . . not even to relieve a citizen from an unjust reflection on his character. . . . There is no relief for this apparent injustice except through the legislature.<sup>9</sup>

Prompted by this decision, the New York Legislature passed a law requiring all data to be returned after acquittal by all police departments, and providing that police officers failing to comply shall be guilty of a misdemeanor.<sup>10</sup> Since the passage of this statute, there has been strict compliance to its mandate.<sup>11</sup>

In 1946, the Supreme Court of Indiana<sup>12</sup> agreed with the proposition set out in *Molineux v. Collins*.<sup>13</sup> The court held that if the legislature has conferred the power to collect the data without mention of their return upon acquittal, as most statutes fail to do, one who seeks return must look to the legislature and not the courts.

But, as the court pointed out, the situation in Indiana is different than in New York. In Indiana, the data obtained at the time of arrest is taken in the discretion of the police, without statutory authority. Therefore, the court reasoned, they may be forced to return the records.<sup>14</sup> However, the court denied relief, pointing out that each case must be decided on its own facts, by balancing the right of privacy and public interest.

The following year the same court again upheld the constitutionality of refusing to return data.<sup>15</sup> The question of violating the right of privacy was again raised in the 1947 New Jersey case of *McGovern v. Van Riper*.<sup>16</sup> Allowing the dissemination of data in advance of conviction, the court held that "the right of privacy has its limitations . . . and must be construed in the light of the individual's relation to the community."<sup>17</sup>

In a decision by the same court three years earlier,<sup>18</sup> the court weighed

<sup>9</sup> 177 N.Y. 395, 398, 69 N.E. 727, 728 (1904).

<sup>10</sup> New York Penal Law (1944) § 516. All data ". . . shall be returned on demand to such person by the police officer . . . or member of any police department having any such photograph . . . and such police officer . . . or member of any police department failing to comply with the requirements hereof, shall be guilty of a misdemeanor."

<sup>11</sup> There have been two cases decided under the New York statute, both granting relief. *Campbell v. Adams*, 206 Misc. 673, 133 N.Y.S. 2d 876 (1954); *Troilo v. Valentine*, 179 Misc. 954, 40 N.Y.S. 2d 442 (1943).

<sup>12</sup> *Mavity v. Tyndall*, 224 Ind. 364, 66 N.E. 2d 755 (1946).

<sup>13</sup> 177 N.Y. 395, 69 N.E. 727 (1904).

<sup>14</sup> This reasoning is criticized in an exhaustive prize-winning article on the issue of returning records upon acquittal appearing in 27 *Temp. L. Q.* 441 (1954).

<sup>15</sup> *Voelker v. Tyndall*, 226 Ind. 43, 75 N.E. 2d 548 (1947).

was again raised in the 1947 New Jersey case of *McGovern v. Van Riper*.<sup>16</sup>

<sup>16</sup> 140 N.J. Eq. 341, 54 A. 2d 469 (1947).

<sup>17</sup> *Ibid.*, at 343 and 471.

<sup>18</sup> *Fernicola v. Keenan*, 136 N.J. Eq. 9, 39 A. 2d 851 (1944).

the factors in determining their decision not to return data. In justifying their decision the court pointed out:

Sometimes a grand jury dismisses a charge because it seems trivial; sometimes the trial jury must acquit a guilty person because the evidence does not establish guilt beyond a reasonable doubt. In every large community are men who have never been convicted of an indictable offense but whose association and manner of life are such that the police feel reasonably assured that such a one, unless he turn over a new leaf, will eventually be guilty of a serious crime.<sup>19</sup>

The New Jersey court was careful to point out that when a man of good repute has a false charge made against him and is cleared, the police should destroy his data. However, their conclusion was:

Since they [the police] are responsible for our safety, it is for them to decide whose identification papers will be apt to assist them in the performance of that duty. It is not for the court to make that decision.<sup>20</sup>

In a case involving a photograph of a speeding violator sent to the F.B.I., a Missouri court also recognized a right of return, but, as in the New Jersey cases, did not compel the return.<sup>21</sup>

A brief examination of the criminal identification sections of all the state statutes discloses that most states have overlooked the particular problem of the return of records after acquittal. About one-third of the states have no mention of criminal identification records whatsoever.<sup>22</sup> A majority of the states have statutes establishing a bureau of criminal identification,<sup>23</sup> but only eight states require the bureau to return the records after acquittal.<sup>24</sup> Only two of these states, New York and Rhode

<sup>19</sup> *Ibid.*, at 10 and 851.

<sup>20</sup> Authority cited note 18 *supra* at 10 and 852.

<sup>21</sup> *Reed v. Harris*, 348 Mo. 426, 153 S.W. 2d 834 (1941).

<sup>22</sup> Alabama, Colorado, Florida, Georgia, Idaho, Indiana, Mississippi, Nevada, North Carolina, Oklahoma, South Carolina, South Dakota, Washington, Wyoming, Wisconsin.

<sup>23</sup> Ariz. L. (1929) c. 16, § 1, as amended Ariz. Rev. Stat. (1956) § 13-1241; Cal. Penal Code (1956) c. 1, § 11,000; Conn. Gen. Stat. (1949) § 3656; Del. Code Ann. (1953) c. 11, § 8501; Ill. Rev. Stat. (1955) c. 38, § 780(e); Iowa Code Ann. (1949) § 80.19; Kan. G.S. (1949) c. 75-711; Ky. Rev. Stat. (1956) § 196.090; La. Rev. Stat. (1950) c. 15:581.1; Maine Rev. Stat. (1954) c. 15, § 18; Md. Code Ann. (1951) c. 88(B), § 19; Mass. Laws Ann. (1948) c. 147, § 4A; Mich. Stat. Ann. (1952) § 4.461; Mont. Code Rev. (1947) c. 80-601; Neb. Rev. Stat. (1943) § 29-209; N.J.S.A. (1955) § 53:1-12; N.M. Stat. Ann. (1955) § 39-3-1; N.Y. Con. Laws Ann. (1944) Penal Law § 516; N.D. Rev. Code (1943) § 12-5803; Ohio Rev. Code (1953) § 5149.01; Ore. Rev. Stat. (1953) § 181.060; Penn. Laws Ann. (1930) c. 19, § 1401; R.I. Gen. Laws (1938) c. 620, § 7; Tenn. Code Ann. (1955) § 38-501; Tex. Rev. Stat. (1951) § 4413 (14); Utah Code Ann. (1953) § 77-59-1; Vt. Stat. (1947) § 10,329; W. Vir. Code Ann. (1955) § 1264(1).

<sup>24</sup> Conn. Gen. Stat. (1949) § 3657; Ill. Rev. Stat. (1955) c. 38, § 780(e); Mich. Stat. Ann. (1952) § 4.463; Mont. Rev. Code (1947) c. 80-601; N.Y. Con. Laws Ann. (1944) Penal Law § 516; Ohio Rev. Code (1953) § 5149.06; R.I. Gen. Laws (1938) c. 620, § 7; W. Vir. Code Ann. (1955) § 1264 (1).

Island,<sup>25</sup> specifically require the city police to return data.

The acquitted person must look to the courts in the other forty-six states. In reviewing the cases, what can be expected from the courts? With the exception of New York, since 1905 the courts have refused to compel city police to return data. The early Louisiana cases that compelled the return of photographs are probably dated because the public rogues' gallery is a thing of the past. Without the aid of a statute the acquitted citizen must rely on his "right of privacy." Here again he meets judicial reluctance, since only about half of the states have recognized the "right to privacy."<sup>26</sup> And now, with the Illinois case of *Kolb v. O'Connor*,<sup>27</sup> refusing to compel city police to return data, where the statute only requires return by the state bureau of criminal identification, the acquitted citizen has small chance of obtaining his records.

<sup>25</sup> N.Y. Gen. Laws Ann. (1944) Penal Law § 516; R.I. Gen. Laws (1938) c. 620, § 7.

<sup>26</sup> A footnote to *Hazlitt v. Fawcett Publications*, 116 F.Supp. 538, 542, 543 (D.C. Conn., 1953) lists the decisions up to 1953. Consult Prosser, *Torts*, 635 (2d ed., 1955) for more recent decisions.

<sup>27</sup> 13 Ill. App. 2d 81, 142 N.E. 2d 818 (1957).

#### LABOR LAW—COURTS MAY NOT INTERFERE WITH SELECTION OF MEMBERS OF LABOR UNION

The plaintiffs, two Negroes, desiring to join a labor union, were denied membership solely on account of the fact that they were Negroes. Plaintiffs based their rights to relief on three grounds, the first of which is that the Wisconsin Constitution, the circuit court has jurisdiction to order the union to admit the plaintiffs. Section nine, Article I, of the Wisconsin Constitution reads:

Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character. . . .

Plaintiffs, therefore, contend that since a wrong has been committed, the Wisconsin courts have jurisdiction to order the union to admit them to membership. The court in turn replied that the wrongs contemplated by this language were those resulting from an invasion of a party's legal rights; and that since unions are voluntary associations which may select their own members, there has been no invasion of the plaintiffs' legal rights. *Ross v. Ebert*, 275 Wis. 523, 82 N.W. 2d 315 (1957).

The case of *Mayer v. Journeyman Stone-Cutters' Ass'n*<sup>1</sup> originated the proposition that courts will not interfere with the selection of membership by a union. It was there held that unions "may restrict membership to the

<sup>1</sup> 47 N.J. Eq. 519, 20 Atl. 492 (1890).